

Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In re Application of )

**ELLIS THOMPSON CORPORATION** )

CC Docket No. 94-136

File No. 14261-CL-P-134-A-86

For facilities in the Domestic )  
Public Cellular Telecommunications )  
Radio Service on Frequency Block )  
A, in Market 134, Atlantic City, )  
New Jersey )

[REDACTED]

DOCKET FILE COPY ORIGINAL

To: Honorable Joseph Chachkin  
Administrative Law Judge

**OPPOSITION TO PETITION TO INTERVENE**

Ellis Thompson Corporation ("ETC"), by its attorneys, pursuant to Sections 1.223 and 1.294(b) of the Commission's rules, herein opposes the Petition to Intervene (the "Petition") filed by Ameritel ("Ameritel") on February 6, 1995 in the above-captioned proceeding.<sup>1</sup> For the reasons discussed below, Ameritel lacks standing to intervene as a matter of right in the captioned proceeding and has not demonstrated that its intervention would assist the Presiding Judge in evaluating the single designated issue such as to justify its intervention as a matter of discretion.

I. Ameritel Has Failed To Demonstrate That It Is A "Party-In-Interest" In This Proceeding.

As a petitioner, Ameritel bears the burden of establishing in its petition that it is a "party-in-interest" such that it is

<sup>1</sup>47 C.F.R. §§1.223 and 1.294(b).

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entitled to intervene as a matter of right in the captioned proceeding.<sup>2</sup> Ameritel's effort to meet that burden consists of a solitary conclusory statement in a footnote that it is the successor-in-interest to Ameritel, Inc. (Ohio), a losing participant in the Atlantic City lottery that was ranked fifth in the lottery results.<sup>3</sup> This effort falls far short of its mark. Having failed to **demonstrate** how Ameritel is the successor-in-interest of Ameritel, Inc., the Petition should be denied.

In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. (Ohio). First, given the Ohio incorporation of Ameritel, Inc. on February 21, 1986, it appears that there was no Ameritel, Inc. when an application for the Atlantic City nonwireline authorization was filed in its name on February 6, 1986.<sup>4</sup> Second, given the Commission's January 29, 1988 grant of its consent for a pro forma assignment of a cellular authorization from Ameritel, Inc. (Ohio) to Ameritel, Inc. (Delaware), it is significant that there is no record of an Ameritel, Inc. having been incorporated in Delaware. Third, given the 1988 merger of Ameritel, Inc. (Ohio) into Metrotec, Inc. (Delaware), there is no

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<sup>2</sup>47 C.F.R. §1.223(a).

<sup>3</sup>Petition at n.7.

<sup>4</sup>See Attachment A hereto; see also Comments on Petition to Intervene filed on February 15, 1995 by the Wireless Telecommunications Bureau (the "Bureau") and Telephone and Data Systems, Inc. ("TDS") at 2 (the Bureau/TDS Comments") and Attachment B thereto; Opposition to Petition For Leave to Intervene filed on February 15, 1995 by American Cellular Network Corp. at 2 (the "Amcell Opposition").

evidence that the FCC either gave its consent or was otherwise notified; nor is there any evidence that the Ameritel, Inc. (Ohio) Atlantic City application survived the merger.<sup>5</sup> Fourth, given that Metrotec, Inc. (Delaware) forfeited its corporate charter in 1990 or 1991, there is no evidence concerning the fate of any of its assets.<sup>6</sup> Fifth, upon due inquiry of the State of Ohio Secretary of State and the County Recorder for Summit County, there is no evidence that a general partnership named Ameritel has filed the required fictitious business name statement with the State of Ohio Secretary of State or made any filing with the County Recorder for Summit County, the registered office location (Akron) for the original applicant, Ameritel, Inc. (Ohio).<sup>7</sup> Sixth, the July 22, 1993 incorporation of a new Ameritel, Inc. in Ohio raises questions concerning its relationship to the original applicant.<sup>8</sup>

While it may be possible that Ameritel can explain some or all of the apparent gaps in its alleged line of succession, the fact of the matter is that it did not do so in its Petition. To give Ameritel another opportunity to do so would defeat the

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<sup>5</sup>See Attachment A hereto, indicating that Ameritel, Inc. (Ohio) was merged out of existence on April 27, 1988, and Attachment B hereto, indicating that the merger took place on June 23, 1988; see also Bureau/TDS Comments at 2 and Attachment C thereto; Amcell Opposition at 2.

<sup>6</sup>See Attachment C hereto.

<sup>7</sup>See Attachment D hereto; see also Amcell Opposition at 2.

<sup>8</sup>See Attachment D hereto; see also Bureau/TDS Comments at 3 and Attachment G thereto.

purpose of the Commission's limitation of the pleading cycle in interlocutory requests to a petition and an opposition.<sup>9</sup>

Ameritel could not have reasonably expected that its conclusory statement that it is the successor-in-interest of Ameritel, Inc. (Ohio) would establish its right to intervenor status or, at a minimum, go unchallenged.

In the event that the Presiding Judge decides that Ameritel should be allowed to make a supplementary filing to demonstrate its basis for intervention as a matter of right, he should require it to chronologically account for and document each movement of an ownership interest in Ameritel, Inc. (Ohio) and in the original Ameritel, Inc. (Ohio) application from the time it was filed in 1986 until the present. (maybe explain why this is important ie, to ensure it is still a legitimate applicant or whatever) Ameritel should be required to demonstrate how each movement of ownership interests in the Ameritel, Inc. (Ohio) application complies with Section 22.944 of the Commission's rules.<sup>10</sup> Ameritel should also be required to (1) explain why the original Ameritel, Inc. (Ohio) application should be given any credence when Ameritel, Inc. (Ohio) did not even exist at the time the application was certified or when it was filed; (2) demonstrate that Ameritel was lawfully formed as an Ohio general partnership; and (3) demonstrate that no ownership interest in

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<sup>9</sup>See 47 CFR §1.294(b).

<sup>10</sup>47 C.F.R. §22.944 (prohibits the "transfer of any interest in any application for initial authorization to operate a cellular system," with certain exceptions).

the Ameritel, Inc. (Ohio) application was written off as a tax loss since 1986. As described above, Ameritel would be creating additional issues rather than assisting in the resolution of the single designated issue.

Finally, ETC is also troubled by the fact that even if Ameritel could demonstrate that it was the successor-in-interest of Ameritel, Inc. (Ohio), its interest as the fifth-selected applicant would be too attenuated to justify intervention as a matter of right. Ameritel cites to Algreg Cellular Engineering<sup>11</sup>, a Review Board decision, in support of its request for intervention as a matter of right.

However, Algreg Cellular Engineering involved mutually exclusive applicants, each of which would have an equal opportunity in any subsequent re-lottery of the subject authorization because the Commission would look to the entire original lottery pool when conducting a second lottery. In the instant case, Ameritel's claim does not arise from its mutually exclusive status so much as it does from the fact that it was the fifth-selected applicant in the Atlantic City lottery. Indeed, the ranking of applicants effectively eliminates the mutual exclusivity considerations because an order of priority has been established. The Commission did not intend to confer standing by requiring the ranking of applicants in a cellular lottery context. The Commission clearly stated that "[t]he rationale for this requirement is that if the first ranked applicant is found

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<sup>11</sup>CC Docket No. 91-142, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991).

to be unqualified there will be alternative selectees available and thus, there will be no need to conduct additional lotteries."<sup>12</sup> Administrative expediency should not be confused with a basis for intervention as a matter of right.

In point of fact, Ameritel's interest is too attenuated to justify intervention as a matter of right. As the Commission recognized in later eliminating the ranking of applicants, "Our experience in conducting several hundred Cellular Radio and Public Land Mobile lotteries has been that only in very few cases has it been necessary to go to the second ranked applicant."<sup>13</sup> In this case, there are a total of four applicants that have an objectively stronger claim to the Atlantic City authorization than does Ameritel. In order for Ameritel to be awarded the Atlantic City authorization, the Commission would have to first deny the ETC application. It would then have to find cause to designate the application of the second-ranked applicant for hearing and disqualify that applicant. It would then have to find cause to designate the application of the third-ranked applicant for hearing and disqualify that applicant. It would then have to find cause to designate the application of the fourth-ranked applicant for hearing and disqualify that applicant. Only under such unprecedented circumstances would

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<sup>12</sup>Cellular and Public Land Mobile Lottery Selection, Order, 4 FCC Rcd 7294 (1988).

<sup>13</sup>Ibid.

Ameritel stand to gain.<sup>14</sup>

II. Ameritel's Participation Would Not Assist The Commission In Resolving The Designated Issue

Section 1.223(b) of the Commission's Rules provides that, in addition to establishing the petitioners' interest in the proceeding, a petition to intervene "must show how such petitioner's participation will assist the Commission in the determination of the issues in question ..."<sup>15</sup> The Commission has indicated that such a showing would require that Ameritel "raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the intervenor the status of a party."<sup>16</sup> Ameritel has failed to make the required showing.

Ameritel correctly points out that this proceeding has its genesis in a lottery held on April 23, 1986. In the often serpentine and consistently challenged path that the ETC application has traveled in the nine years since then, not once did Ameritel, in any of its incarnations, participate. Ameritel's belief that its participation at this stage of the proceeding would "assist the Commission in the determination of

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<sup>14</sup>The fact that Ameritel's interest is so attenuated raises a question as to Ameritel's true motives in seeking intervention after nine years of passivity.

<sup>15</sup>47 C.F.R. §1.223(b).

<sup>16</sup>Victor Muscat, 31 FCC 2d 620, 621 (1971).

the issues in question" is belied by its failure to participate at any time in the past nine years. As such, Ameritel is uniquely unfamiliar with the issues and its participation could serve no useful purpose. There is nothing in Ameritel's Petition to demonstrate that it has particular or unique knowledge such that its assistance as a party is needed to resolve the single designated issue.<sup>17</sup>

The fact that neither TDS nor Amcell was one of the ten ranked applicants for the Atlantic City authorization is entirely irrelevant. Ameritel ignores the contentious litigation involving ETC, Amcell and TDS at both the Commission and in the courts that has continued unabated for more than eight years.<sup>18</sup> It further ignores the active participation of the Wireless Telecommunications Bureau (the "Bureau") in this proceeding. Both TDS and the Bureau are committed to the investigation of the facts in this case. Indeed, the parties have exchanged document production requests and have discussed the taking of depositions. Ameritel's participation would add nothing constructive.

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<sup>17</sup>GAF Broadcasting Company, Inc., MM Docket No. 93-54, FCC 93M-360 at ¶4 (ALJ Chachkin, June 15, 1993).

<sup>18</sup>Ameritel alludes to the current makeup of the parties in this proceeding as a "lose-lose" scenario for both TDS and Amcell because a denial of ETC's application would not result in either Amcell or TDS "retaining any interest in the Atlantic City Authorization." This is indeed a strange thing for Ameritel to argue since the denial of ETC's application does not result in Ameritel obtaining any interest in the Atlantic City authorization either. It would merely buy Ameritel the opportunity to protest the second-ranked applicant, then, if successful, the third-ranked applicant, then, if successful, the fourth-ranked applicant. Ameritel also ignores the long-standing administrative and judicial litigation between Amcell and TDS in its "lose-lose" scenario.




In view of Ameritel's failure to establish how its participation would assist the Commission in resolving the designated issue and the Commission's view that "[i]n order to preserve administrative orderliness and to provide administrative finality, Commission policy disfavors intervention," Ameritel's request for a Section 1.223(b) intervention should be denied.<sup>19</sup>

Wherefore, the Petition to Intervene filed by Ameritel should be denied.

Respectfully submitted,

ELLIS THOMPSON CORPORATION

By:   
Stuart F. Feldstein  
Richard Rubin  
Christopher G. Wood

Its Attorneys

Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

February 21, 1995

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<sup>19</sup>Teleconnect Company v. The Bell Telephone Company of Pennsylvania, et. al, 6 FCC Rcd 5202, 5206 (1991); Id. at n.52 ("Section 1.223(b) provides our only standard for considering a petition to intervene.")

**ATTACHMENT A**

1ST DOCUMENT of Level 1 printed in FULL format.

\*\*\* THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY BE OBTAINED THROUGH THE OFFICE OF THE OHIO SECRETARY OF STATE. \*\*\*

OHIO SECRETARY OF STATE, CORPORATE RECORD

NAME: AMERITEL, INC.

TYPE: DOMESTIC FOR PROFIT CORPORATION

STATUS: NOT IN GOOD STANDING

DATE OF INCORPORATION/QUALIFICATION: 02/21/1986

MAILING ADDRESS: AKRON

COUNTY OF PRINCIPAL OFFICE: SUMMIT

REGISTERED AGENT: THOMAS E RAWLINGS

REGISTERED OFFICE: 277 S BROADWAY  
AKRON  
44308

INCORPORATORS: GENE FOLDEN

CHARTER NUMBER: 672324

CAPITAL/STOCK: \$ 0 750SH NO PAR COMMON

HISTORY:

DATE	TRANSACTION	ROLL	FRAME
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04/27/1988	MERGER INTO AN UNQUALIFIED FOREIGN CORPORATION (OH 672324) INTO METROTEC, INC.	G398	0161
04/27/1988	MERGED OUT OF EXISTENCE DOMESTIC ARTICLES/FOR PROFIT		
02/21/1986	CORPORATION	F842	0530

\* ENTER LEXDOC TO ORDER A CERTIFICATE OF GOOD STANDING OR OTHER DOCUMENTS \*

**ATTACHMENT B**

\*\*\* THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY  
BE OBTAINED THROUGH THE DIVISION OF CORPORATIONS OR FROM A DELAWARE  
REGISTERED AGENT'S OFFICE LOCATED WITHIN THE STATE OF DELAWARE. \*\*\*

## DELAWARE CORPORATION/LIMITED PARTNERSHIP RECORD

02/21/1995

Name: AMERITEL, INC.

Corporation Type:	Foreign Corporation
Corporation Status:	Merged
State File No:	9102688
State of Incorp:	OH
Merger Date:	06-23-88
Merger Time (EST):	
Merger Survivor:	2149852 METROTEC, INC.

Comments:

NOTE: As defined by the Delaware Secretary of State's Office, a  
"Non-Delaware" Corporation is a corporation that (1) is not incorporated nor  
qualified to do business in Delaware, and (2) has merged into or out of a  
Delaware corporation.

**ATTACHMENT C**

\*\*\* THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY  
BE OBTAINED THROUGH THE DIVISION OF CORPORATIONS OR FROM A DELAWARE  
REGISTERED AGENT'S OFFICE LOCATED WITHIN THE STATE OF DELAWARE. \*\*\*

## DELAWARE CORPORATION/LIMITED PARTNERSHIP RECORD

02/21/1995

Name: METROTEC, INC.

State File ID Number: 2149852  
Corp./Ltp. Type: Domestic Corporation  
Corp/Ltp. Status: Forfeited  
Classification: General

State of Incorp: DE  
Date of Incorp/Qual: 01-21-88  
Date of Expiration: 10-29-91

Registered Agent: 0000000 INFORMATION IS NOT AVAILABLE

Last Annual Report: 1989  
Date of Renewal:  
Date Revocation Filed:  
Bankruptcy Date:

Merged State:  
Merged File No:  
Tax Type: A/R Filing Required  
Tax Balance: 116.40  
Current Tax Estimate:  
Quarterly:

State File No.: 2149852

Last System Update: 03-05-90

## CURRENT STOCK INFORMATION FOR: METROTEC, INC.

Stock Amendent Number: 000

Start Date:01-21-88 Time: 10:00

Total Assets:

Stop Date:

No.	Description	Cls Ser	Authorized	Issued	Par Value
1	OMMON		3,000		
TOTAL			3,000		

## TAX HISTORY FOR: METROTEC, INC.

## PETITION

YEAR	STATUS	TAXES	INTEREST	PENALTY	CHECK CHGS	DATES & STATUS
1991	Due:	30.00				
	Adjustment:					
	Paid:					
	Ann Rpt Filed:		Index No.:			
1990	Due:	30.00	6.40	50.00		
	Adjustment:					
	Paid:					
	Ann Rpt Filed:		Index No.:			
1989	Due:	30.00				
	Adjustment:					
	Paid:	40.00				
	Ann Rpt Filed:		Index No.:			



**ATTACHMENT D**

1ST DOCUMENT of Level 1 printed in FULL format.

\*\*\* THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY BE OBTAINED THROUGH THE OFFICE OF THE OHIO SECRETARY OF STATE. \*\*\*

OHIO SECRETARY OF STATE, CORPORATE RECORD

NAME: AMERITEL, INC.

TYPE: DOMESTIC FOR PROFIT CORPORATION

STATUS: IN GOOD STANDING

DATE OF INCORPORATION/QUALIFICATION: 07/22/1993

COUNTY OF PRINCIPAL OFFICE: MONTGOMERY

REGISTERED AGENT: WILLIAM H TURNER

REGISTERED OFFICE: 110 N PATTERSON BLVD  
DAYTON  
45402

INCORPORATORS: IRA P QUICKLY

CHARTER NUMBER: 850485

CAPITAL/STOCK: \$ 0 1000 NO PAR COMMON

HISTORY:

DATE	TRANSACTION	ROLL	FRAME
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07/22/1993	DOMESTIC ARTICLES/FOR PROFIT CORPORATION	H647	1275

\* ENTER LEXDOC TO ORDER A CERTIFICATE OF GOOD STANDING OR OTHER DOCUMENTS \*

**CERTIFICATE OF SERVICE**

I, Sheila L. Borghi, a secretary in the law firm of Fleischman and Walsh, L.L.P., do hereby certify that I have on this 21th day of February, 1995, had copies of the foregoing "Opposition To Petition To Intervene" mailed by U.S. first class mail, postage prepaid, to the following:

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Federal Communications Commission  
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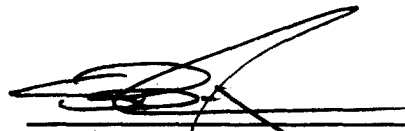
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\_\_\_\_\_  
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\* By Hand

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